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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CORRECTED COPY

City of Chicago,

Petitioner,

v.

Jesus Morales, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA, PUERTO RICO AND VIRGINIA AND TERRITORY OF VIRGIN ISLANDS IN SUPPORT OF THE PETITIONER

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with 32 other *amici* States and Territories, join the City of Chicago in urging the Court to reverse the decision of the Supreme Court of Illinois. The *amici* States and Territories share Chicago's concerns about the urban violence and community dysfunction spawned by criminal gangs and share responsibility with their political subdivisions for rooting out these problems. For these reasons and those elaborated below, we offer this brief to urge the Court to uphold the Chicago gang loitering ordinance and to confirm that the Constitution tolerates measured law-enforcement steps in this area.

The problems associated with youth gangs are new in kind -- so new that they would have surprised most prior generations of Americans. Whether it be the random violence associated with such gangs, their aggressive recruitment of new members, their public intimidation of law-abiding citizens or their disproportionate contribution to the palpable sense of lawlessness dominating many American neighborhoods, history offers few examples of this phenomenon. Still less does it trace teenagers as the primary source of such activity.

National statistics regarding gang membership illustrate the point. Not until 1975 did national organizations even begin meaningfully to compile such data. At that point, there were a total of 55,000 gang members. *See* 1995 National Youth Gang Survey (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention August 1997) ("Survey"), at 2. During the next 20 years, the figure increased to 97,940 gang members in 1982, to 120,636 in 1988, to 249,324 in 1992, and to 378,807 in 1994. *Id.* By 1995, the estimated number of gang members nationwide was at least 664,906. *Id.* Other researchers confirm similar trends. Survey, at 2.

Nor has any pocket of the country managed to insulate itself from these disturbing trends. A recent survey confirms the pervasive scope of gang influence in modern America: It reveals gang activity in all fifty states; it demonstrates a gang presence in rural as well as urban counties; and it shows a total of 23,388 youth gangs. Survey, at xi. The increase in gang membership extends to all racial groups, be they Hispanic, Caucasian, African-American or Asian. A. Valdez, *Gangs: A Guide To Understanding Street Gangs* (1997), at 356-57; R. Jackson & W. McBridge, *Understanding Street Gangs* (1984), at 31.

Along with the widespread expansion of gang membership has come an all-too-familiar pattern of increased criminal activity. In 1993, there were an estimated 580,331 gang-related crimes nationwide, a number that reflects an eight to eleven fold increase from 1991. D. Curry, et al., *Estimating the National Scope of Gang Crime from Law Enforcement Data* (Nat'l Institute of Justice, Aug. 1996), at 3-4. Most law enforcement agencies report that gang problems have yet to abate, with some reporting that they are the same and almost half reporting that they continue to get worse. Survey, at xi.. A 1996 Ohio study, for example, identified 1,884 gangs in the State with a total membership of 20,443. 1996 *Ohio Gang Survey* (Ohio Attorney General Office Anti-Gang Unit, 1996). According to the study, gang-related homicides grew from 1 per year in 1980 to 69 per year in 1990 to 86 per year in 1995. *Id.*

One of the defining characteristics of street gangs is their desire to assert control over territory and to protect it from rival gangs. *See* Jackson & McBride, at 19. By "claim[ing] a turf or neighborhood as theirs" and by monopolizing street corners through their overwhelming presence, Valdez, at 25, gangs "can literally take control of neighborhoods and cities," *id.* Group loitering thus facilitates efforts to control territory, aids in recruitment, and most conspicuously causes much of the random violence associated with gang activity. From the gang member's

perspective, the fact that "some neighborhoods are continually terrorized by gang attacks," Jackson & McBride, at 20, is simply a necessary evil associated with each gang member acting "as a soldier protecting his turf in an ongoing war with rival gangs," *id.* at 26. From the perspective of other members of the community, of course, the gangs' efforts to control territory by group loitering is a leading cause of random violence. "In 1991, there were 771 gang-related deaths in Los Angeles alone. About 25% of those killed were innocent bystanders, people who had nothing to do with gangs .... They simply were in the wrong place at the wrong time." Valdez, at 41. Similar statistics exist for other cities. *See* J. Howell, *Youth Gangs* (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #72, December 1997).

To their credit, State and local governments have responded to these developments through a number of different strategies. At the State level, many legislatures have targeted gang crimes for additional penalties. Ohio for example recently enacted legislation making it a second degree felony to "actively participate" in a criminal gang and to promote or assist in the commission of specified crimes, while also enhancing the penalties for violent offenders convicted under a specification of gang participation. Sub. H.B. 2 (5/11/98). The Ohio legislation follows the lead of California's "STEP" legislation ("street terrorism enforcement and prevention"), first enacted in 1988 and amended several times since then. *See* Cal. Penal Code §§186.20, 186.21 (legislative findings), 186.22(a) (prohibiting active participation as well as promoting or assisting certain predicate offenses), 186.22(c), (f) (definitions), 186.26 (offense of coercing a minor to participate in a gang), 186.28 (offense of supplying firearms to gang). In like manner most other States either criminalize gang participation or enhance penalities based on the gang-related nature of criminal acts. *See* Appendix A.

Continuity and change mark Chicago's response to the problems associated with street gangs. On the one hand, the city has followed the traditional approach of using membership in a criminal gang as a relevant criterion for law enforcement activity. But, in contrast to these other laws, the Chicago ordinance takes a more proactive stance toward law enforcement. Instead of predictably increasing the sentences imposed for gang-related crimes, instead of building still-larger prisons to house the youths responsible for these actions, Chicago has tried to alter the community climate that allows gang activity to fester. In curbing gang loitering, in other words, the city has targeted the environment that allows criminal activity to occur at all. The idea is this: If law-abiding citizens can reclaim the streets, if youths believe they need not join a gang for their own safety, if in short the community no longer tolerates this and other forms of outward lawlessness, gang intimidation and gang crimes will diminish. *See, e.g.*, James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, 33-38; George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* (1996).

The Illinois Supreme Court did not appear to doubt any of this. Yet under its holding society's power to defend itself against these acknowledged evils was sharply curtailed. It would seem to be an essential function of State and local government to determine the proper balance between rights and regulations concerning access to and enjoyment of a community's streets, above all to ensure equal access to this basic component of urban life and to curb the kind of urban environment that allows criminal activity to proliferate. Because the *amici* States respectfully believe that the Constitution does not disable them from taking reasoned steps toward criminal gang control and community policing, we submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

I. The Chicago ordinance does not violate substantive due process. The law as an initial matter meets the minimal requirement of coupling a "rational" measure to "legitimate state interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). The thorough fact findings of the Chicago City Council by themselves adequately unite the sensible means of regulating gang loitering to the ends of public safety and public-order maintenance. Neither *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), nor any other case holds to the contrary. No doubt the *Papachristou* laws were "archaic," *id.* at 161, "no longer fit the facts," *id.* at 162, and were "too generalized," *id.* at 171, properly making them susceptible to attack even on rational-basis grounds. But the up-to-date, carefully-calibrated Chicago ordinance contains no such flaw.

Nor does the ordinance warrant heightened review. By any measure of fundamental rights, loitering comes up short. The text of the Constitution offers no indication that loitering deserves special protection. History also fails to sustain this claim, as most States regulated a wide range of loitering activities in 1868, and still do so today. The case law, *Papachristou* included, also fails to establish a constitutional safe harbor for loiterers, much less for those who are members of a criminal gang that has been found to use loitering as a cover for criminal activity, intimidation of law-abiding citizens, and as a method of recruitment.

II. The ordinance also avoids the twin shoals of impermissibly vague laws. First, it supplies all the "fair warning" that due process requires. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The law does not trap the unwary because no prosecution ever occurs unless the police have first asked the citizen to disperse and the citizen has thereafter refused. Second, while the ordinance is "marked by flexibility and

reasonable breadth, rather than meticulous specificity," *id.* at 110 (quotation omitted), it contains ample guideposts to prohibit "arbitrary and discriminatory enforcement," *id.* at 108. The law for example does not cast a large net, but a small one, because only the citizen who disregards a warning to disperse falls within it. And the law's further limitation to loitering by or among criminal gang members further reduces the risk of wholly subjective and capricious enforcement.

III. While this carefully-drafted ordinance satisfies the substantive and procedural dictates of due process on its face, other constitutional protections prevent Chicago and other governments from improperly implementing this and other laws in the future. The distinction between facial and as-applied challenges ensures that a law, even though once upheld on its face, may still not be improperly implemented in particular settings. A wide range of constitutional mandates precludes discriminatory enforcement of such measures, the manipulation of such laws to curb free speech, or the use of such laws to punish individuals for their status rather than their actions.

ARGUMENT

The safeguards afforded by the due process clause, whether procedural or substantive, whether incorporated or unincorporated, do not require an across-the-board invalidation of Chicago's gang ordinance. In each respect the ordinance steers clear of the Fourteenth Amendment's bar against irrational laws, laws that infringe fundamental rights and laws that are impermissibly vague. The lower court's contrary decision should be reversed.

I. THE ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

The Illinois Supreme Court held (Pet. 15a-17a) that the Chicago gang ordinance violates substantive due process in two respects -- because it is "arbitrar[y]" in nature and because it intrudes upon the fundamental right to "freely walk the streets and associate with friends." In each respect, the lower court was wrong, and indeed every benchmark of constitutionality points the other way.

A. The Chicago Ordinance Satisfies The Minimal Requirements Of Rational-Basis Review.

The Chicago ordinance as an initial matter is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). The prohibition against arbitrary lawmaking simply does not bar all or even most anti-loitering laws, and certainly not Chicago's. The fact findings of the Chicago City Council amply connect the sensible means of limiting gang loitering to the laudable end of public safety and public-order maintenance. While the lower court relied on *Papachristou* in reaching a contrary conclusion, that decision does not bear the heavy weight the court gave it.

The deliberate nature of Chicago's efforts to regulate criminal gang loitering contrasts markedly with the anachronistic Jacksonville ordinance (and State-law statutes) invalidated by *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) 26 years ago. The *Papachristou* laws addressed a problem whose time had come and gone. As a brief review of the provisions confirms, *see id.* at 158, "Jacksonville's ordinance and Florida's statute were derived from early English law, and employ[ed] archaic language in their definitions of vagrants," *id.* at 161 (quotation omitted). Even though "the theory of the

Elizabethan poor laws" that perpetuated and harshened these laws "no longer fit the facts," and even though the "conditions which spawned these laws may be gone," the "archaic classifications remain[ed]" in Florida in the early 1970's. *Id.* at 161-62 (quotations omitted).

Unlike the *Papachristou* laws, which after years of innocuous desuetude were suddenly enforced in Florida, the Chicago ordinance takes aim at a distinctly modern problem with a fresh set of legislative facts to support it. The law represents the culmination of thorough study and consideration. And it takes on the acute problems of youth gang crime by carefully regulating criminal gang loitering in the urban setting. Three specific harms form the basis for the law:

* **Intimidation.** By occupying a street corner or some other public place, criminal gang members chill ordinary, legitimate passage by law-abiding citizens, thereby securing an area for conducting criminal activity -- most prominently and most usually, drug-dealing.

* **Facilitation.** The presence of loitering criminal gang members provides a context in which crime flourishes. A drug transaction in a loitering crowd provides cover, allows perpetrators to evade being caught, and creates a group dynamic of lawlessness that exceeds the sum of its individual parts. The conspicuous presence of the gang also makes it difficult for innocent youths to resist the temptation (or outright pressure) to join a gang.

* **Victimization.** A cruel feature of criminal gang activity is the loss of young lives through gang shootings, be they the lives of fellow gang members or those of unfortunate bystanders. Loitering by persons with identifiable gang membership, the Chicago experience has shown, creates a frequent target for rival gangs.

These public policy considerations together with those identified in the extensive hearings before the City Council plainly establish a rational basis for passing this law. Unlike the *Papachristou* ordinances, the Chicago law regulates a current and serious problem, and does so on the basis of up-to-date legislative findings. The provision also uses familiar definitions of crime. A "pattern of criminal gang activity" for instance mirrors the familiar concepts of "enterprise" and "pattern of racketeering activity" found in federal and state RICO legislation, *see Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57-59 (1989), *United States v. Turkette*, 452 U.S. 576, 578-79 (1981), a feature of the law that helps to distinguish it from *Papachristou* and other cases as well. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453-54 (1939) (finding law vague because it defined "gang" to mean simply "two or more persons" without defining impermissible gang conduct).

In further contrast to the *Papachristou* laws, Chicago's delegation of authority to disperse loiterers based on an officer's objective determination that one of them is likely to be a criminal gang member represents an innovation in community policing. It is typical of other urban initiatives designed to abate youth gang crime by moving from a crime-solving model of law enforcement to a preventive, community-policing model. The new approach turns on the insight that by declining to tolerate mild levels of public disorder, cities can avoid the all-too-familiar spiral into more severe disorder, crime and community dysfunction. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L.Rev. 551, 581-82 (1997) (citing empirical research supporting the "broken windows" thesis -- that unremediated disorder leads to greater disorder). Besides offering a fresh approach to urban crime, this initiative also addresses the concern of many urban communities that

"passivity in the face of outrageous street behavior" constitutes a critical law-enforcement shortcoming. G. Kelling & C. Coles, *Disorder and the Court*, 116 Pub. Interest 57, 70 (1994).

In the final analysis, there is little continuity between the laws invalidated in *Papachristou* and the provision challenged here. The *Papachristou* laws no doubt failed to meet the bare rationality standards of substantive due process. The laws were indeed "archaic," 405 U.S. at 161, "no longer fit[] the facts," *id.* at 162, and were "too generalized," *id.* at 171. Instead of being a virtue, the age of the *Papachristou* laws had become a constitutional vice. From the antiquated language used to describe the offenses to the unusual targets of the provisions (*e.g.*, "habitual loafers," "common night walkers," "common railers and brawlers," "persons . . . habitually spending their time by frequenting houses . . . where alcoholic beverages are sold or served," or "persons able to work but habitually living upon the earnings of their wives"), the law lacked even the most modest relevance to modern Florida. But the same simply is not true here. The Chicago law takes aim at a quintessentially modern problem and does so in careful reliance on a set of "new and different conditions." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"). *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966); *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954). By any measure of rationality, the Chicago ordinance serves legitimate ends and does so through reasonable means.

B. Neither The Text Of The Constitution, History Nor Case Law Establishes A Fundamental Right To Loiter.

Nor does the ordinance warrant heightened review. Loitering simply is not one of those fundamental rights that are (1) "'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)), or (2) so "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Loitering thus has never been -- and should not be -- added to the short list of elemental rights substantively protected by due process, *e.g.*, the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to bodily integrity, and to abortion. *See id.* In this setting, there is no justification for overcoming the "reluctan[ce] to expand" fundamental rights covered by substantive due process. *Glucksberg*, 117 S.Ct. at 2267 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

In reaching a different conclusion, the Illinois Supreme Court did not rely on the text of the Constitution. Nor could it have done so. In simultaneously empowering the people to retain and in some instances resist the authority of their local governments, the Constitution nowhere carves out a safe haven for loiterers. Neither the liberty guarantees in Article I (*e.g.*, ex post facto, impairment of contracts, bill of attainder), Article IV (*e.g.*, privileges and immunities), the Bill of Rights nor the Fourteenth Amendment establishes any such broad libertarian principle. And perhaps the most important liberty safeguard -- the separation of powers within and without the national government created by the structure of the Constitution -- does not do so either.

Quite to the contrary, the States' retention of broad police powers presupposes "a reasonable opportunity to experiment with solutions to admittedly serious problems," including their "interest in attempting to preserve the quality of urban life." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). The local police power would mean little if it did not permit prophylactic regulations in the name of a greater good, or put differently if the due process clause were "so broadly construed that the Congress and state legislatures [were] put in a strait jacket when they attempt[ed]" to remedy "conditions which they regard[ed] as offensive to the public welfare." *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949). The "promotion of safety of persons and property is unquestionably at the core of the State's police power," *Kelley v. Johnson*, 425 U.S. 238, 247 (1976), and"[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal," *United States v. Salerno*, 481 U.S. 739, 747 (1987). In the end, any fair reading of the text and structure of the Constitution confirms that the States that imposed the liberty protections of the Constitution upon themselves did not relinquish the basic rights to preserve the safety of their communities and to experiment with new ways for doing so.

Nor do the lessons of history lend support to the claim that loitering is a fundamental right. In neither 1791 nor 1868 is there the slightest indication that the framers of the due process clause, to say nothing of the citizens who ratified the clause, thought that they were outlawing anti-loitering ordinances. Much the opposite is true. State and local governments customarily placed limits on public loitering and vagrancy both before and after ratifying the Fifth and Fourteenth Amendments. *See* Appendix B. And today most States as well as the federal government continue to prohibit loitering in a wide range of settings. *See* Appendix C.

No more helpful to the opponents of this carefully-enacted ordinance are the teachings of precedent. The Court to be sure has been careful to insist that anti-loitering laws comply with the prohibition against impermissibly vague criminal laws. But no holding of the Court has ever found a constitutional right to loiter or what comes to the same thing -- the view that loitering laws are by their nature inherently arbitrary exercises of government power.

Like many other lower courts during the past 26 years, the Illinois Supreme Court relied on the following passage from *Papachristou* in reaching a different conclusion:

> The difficulty is that these [types of loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. at 164. Neither this passage nor any other, however, elevates loitering to a fundamental right. The excerpt simply makes the observation -- wholly unnecessary to the result in the case -- that anti-loitering laws frequently implicate innocent-seeming conduct, not that such conduct is forever "outside the arena of public debate and legislative action." *Glucksberg*, 117 S. Ct. at 2268.

II. THE CHICAGO ORDINANCE IS NOT IMPERMISSIBLY VAGUE.

Besides complying with the requirements of substantive due process, the Chicago ordinance also satisfies the due process prohibition against vague criminal laws. The provision avoids the two flaws that characterize such laws -- either that they fail to "provid[e] fair warning" of what is prohibited or that they fail to "provide explicit standards" to limit the discretion of those who enforce the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In plain terms, the ordinance (1) authorizes the police to issue a dispersal order when they reasonably believe that one or more loiterers is a criminal gang member; (2) gives additional notice to all persons covered by the law when they are told to disperse; and (3) sanctions only those who disobey the police orders. These provisions bring the ordinance well within the requirements of due process.

A. The Chicago Ordinance Gives Ample Notice Of The Conduct It Prohibits.

The ordinance plainly satisfies the threshold requirement of "providing fair warning." *Grayned*, 408 U.S. at 108. It "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and what is not in at least one dispositive sense. *Id.* Most notably, Chicago chose not to regulate loitering in and of itself. It opted only to regulate loitering when combined with criminal gang activity and when combined with a refusal to obey a police dispersal order. Under these circumstances, no one can tenably claim surprise. Even the citizen who remains ignorant of the law's existence (which is never a defense), even the citizen who is not a gang member, even the citizen who does not know with whom he or she is loitering, and even the citizen who claims ignorance on all three fronts can never claim lack of notice. Because a violation of the ordinance occurs only after the citizen willfully disobeys

a dispersal order by the police, even the most "fertile legal 'imagination'" cannot contrive situations in which the law will trap the unwary. *Id.* at 108, 110 n.15 (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). All told, these features of the law bring it well within the parameters of other laws the Court has upheld, and eliminate any specter of unforeseen prosecutions. *See, e.g., Grayned*, 408 U.S. at 113 (upholding conviction for creating noise near school where law construed to require showing of interference with school activities); *Colten v. Kentucky*, 407 U.S. 104, 108-09 (1972) (upholding conviction under disorderly conduct statute that required compliance with dispersal order). *Cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (upholding disobedience-to-police-order law when coupled with element of sidewalk blockage).

Notwithstanding these clear contours of the law and notwithstanding the Court's decisions supporting the provision, the lower court still found a notice problem. It faulted the ordinance for failing to alert the citizen "whether an approaching police officer has a reasonable belief that the group contains a member of a criminal gang." Pet. 11a-12a. In the lower court's view, in other words, the validity of requiring compliance with police orders turns on whether the individuals subject to the order themselves perceive an objective basis for the order, not whether the officers have an objectively reasonable basis for issuing the order. This view does not square with traditional requirements of notice, overlooks contrary vagueness decisions by the Court and threatens to upset longstanding assumptions about the authority of the police to enforce the law.

The lower court, to begin with, misapprehended the constitutional point of notice. It serves not to arm citizens with sufficient information to attack the legitimacy of an application of a statute or even to attack the constitutionality of a law itself, but only to warn citizens of what the law proscribes. Due

process has never required citizens to be sure that all elements of a criminal prosecution have been met before an arrest, only that they have notice of what those elements are, so they can shape their conduct to avoid arrest.

The lower court's analysis also fails to respect precedent. Several of the Court's vagueness decisions have embraced public-order laws that turn on an officer's reasonable belief that a public-safety risk exists, and indeed rely on that belief in upholding the law. *See Boos v. Barry*, 485 U.S. 312, 331-32 (1988) (plurality) (rejecting vagueness challenge to ordinance limiting demonstrations at embassies because it was interpreted to permit dispersal "only when the *police reasonably believe* that a threat to the security or peace of the embassy is present") (emphasis added); *Grayned*, 408 U.S. at 114 (ordinance prohibiting noisy interference with school activity "requires the exercise of some degree of *police judgment*, but, as confined, that degree of judgment here is permissible") (emphasis added); *Colten*, 407 U.S. at 109 (upholding conviction for refusal to obey dispersal order where "*police* had cause for apprehension . . . [of] the risk of accident") (emphasis added). No vagueness case to our knowledge has ever restricted the enforcement of a public-order statute on the ground that it provides insufficient notice of the *officer's reasonable belief* that the terms of the law apply.

Worse still, the lower court's position threatens to upset traditional expectations about the authority of the police to investigate, ferret out and stop crime. The most pertinent benchmark for measuring the authority of law enforcement to stop, seize or question individuals -- the Fourth Amendment -- has long used "reasonable suspicion" and "probable cause" as objective touchstones for determining when government may interfere with individual liberty. *See Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). And the Court has never assessed compliance with this standard from the perspective of the *individual's*, as

opposed to the officer's, objective determination of whether cause exists to request an accounting of an individual's conduct.

As in the Court's vagueness decisions, its Fourth Amendment decisions have frequently examined the objective reasonableness of law-enforcement action from the standpoint of the officer involved, not the individual suspected of crime. *See Ornelas v. United States*, 116 S.Ct. 1657, 1661-62 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether those historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause") (emphasis added); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (standard of reasonableness is "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate") (emphasis added) (internal quotation omitted). Just as Chicago authorizes an officer to stop "a person whom he [or she] reasonably believes to be a criminal street gang member," 8-4-015(a), moreover, so too federal drug enforcement agents frequently stop travelers in an airport who fit the profile of a drug courier. In the drug interdiction context, the Court has frequently permitted such detentions, which (it is worth adding) pose far more risk of arrest and loss of liberty than an order to disperse. *See United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

Surely, in the light of these precedents, Chicago does not offend the Constitution when it authorizes officers to impose a *de minimis* restriction on individual liberty with a far greater explanation for doing so than these Fourth Amendment decisions require. Here, officers observed a group of persons loitering in a public place. They formed a "reasonable belief" that the individuals belonged to a criminal gang. They asked

them to disperse. Then and only then did the officers arrest anybody, and even then only for failing to do what all citizens in a civil society customarily have been expected to do -- obey the police. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy"). The authority of law enforcement to intrude upon an individual's liberty simply does not turn on -- and has never turned on -- the suspect's insight into the reasonableness of the officer's action.

Neither do *Papachristou* or *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), change things. The *Papachristou* law did not even involve a dispersal order. It thus did not provide the most explicit form of notice, a requirement that the police first order a dispersal before being empowered to arrest anyone.

Also inapt is *Shuttlesworth*. True, *Shuttlesworth* contains *dicta* criticizing a law construed to permit police to ask any individual "stand[ing]" on a public sidewalk to leave, then giving the police permission to arrest objectors. 382 U.S. at 88. True also, the *Shuttlesworth* law gave notice to citizens accused of standing because the police had to ask them to leave before an arrest could ensue. *Id.* But this bizarre law, written as broadly and irrationally as a law could be, represents a far cry from a law targeting loitering by criminal gang members found to pose a threat to the health and safety of an urban community. Even putting to one side the free speech and racial discrimination concerns lurking beneath the application of the law, *see id.* at 91, *id.* at 102 (Fortas, J., concurring, joined by Warren, C.J.), the *Shuttlesworth* provision contained a notice flaw that the Chicago ordinance does not. While the officer's request to move on alerted citizens that they could not remain standing where they were, it offered no notice of where in the future they could stand, when or with whom. The citizen of

Birmingham truly could "stand on a public sidewalk . . . only at the whim" of a police officer. *Id.* at 90. But that is not true in Chicago. Only those citizens who loiter on a public street, as opposed to simply standing there, may be asked to move on, and even then only when they are loitering with members of a narrowly defined criminal gang. The focused notice provided in the one encounter has little parallel to the absence of notice provided in the other. The Chicago ordinance in the end wholly satisfies the due process requirement of notice.

B. The Chicago Ordinance Supplies Reasonable Standards For Enforcement That Are Legitimately Related To Public Safety.

Just as the ordinance provides ample warning of what it forbids, so also it contains sufficient implementation guidelines. It thus avoids the pitfalls of "arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), and the risks of a law that has an "unascertainable" standard for enforcement, *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971), *see Kolender*. "As always," it is true, enforcement of the Chicago ordinance "requires the exercise of some degree of police judgment." *Grayned*, 408 U.S. at 114. But that discretion, necessary under any reasoned view of the appropriate powers of law enforcement, does not cross the line between the permitted "flexibility and reasonable breadth" all statutes need, *id.* at 110 (quotation omitted), and the forbidden territory of a standardless law. The law ultimately "defines boundaries sufficiently distinct for citizens, policemen, juries, and appellate judges." *Id.* (internal quotation omitted).

The law cabins police discretion in several important ways. It applies to public loitering, not to standing. *Cf. Shuttlesworth* 382 U.S. at 90. It applies only to those individuals who loiter with members of criminal gangs, not just to "three or more persons" who "assemble" together in a way

that is "annoying" to others. *Cf. Coates*, 402 U.S. at 611 n.1. It requires the police to have a "reasonable belief" that a gang member is present, not just a subjective instinct or personal annoyance. *Cf. Coates*, 402 U.S. at 614; *Kolender, supra.* It prohibits prosecution when the police are wrong (*e.g.*, when no criminal gang member is present), a requirement missing from every one of the vagueness decisions relied on by the lower court. And it permits arrests only when citizens refuse to disperse, thereby sharply curtailing the risks of discriminatory enforcement that existed in *Papachristou, Kolender,* and *Coates*.

The prerequisite of a dispersal order also eliminates another risk associated with general loitering laws. Because police may stop individuals reasonably suspected of criminal activity under *Terry*, a general loitering prohibition without more would allow the police to stop and pat down virtually anyone standing on a public street. Here, however, no violation of the law ever occurs until the dispersal order is ignored, eliminating any such risk of virtually unrestricted *Terry* stops.

On several occasions the Court has upheld other public-order laws that give the police similar discretion and in some cases even more. For example, *Boos v. Barry,* 485 U.S. 312 (1988), rejected a challenge to a law that permitted police to disperse groups near foreign embassies "when the police reasonably believe that a threat to the security or peace of the embassy is present." 485 U.S. at 330. The Court noted that the law's "reach is limited to groups posing a security threat," 485 U.S. at 331, and the law also announced the "prohibited quantum of disturbance" in "words of common understanding." Here, no less, the Chicago ordinance says that citizens may be asked to disperse when police officers have a reasonable belief

that they are loitering with members of a "criminal street gang," and does so because the City Council believes that such congregations pose "a security threat."

Colten v. Kentucky, 407 U.S. 104 (1972), follows a similar course. It upheld a conviction for disorderly conduct when officers ordered a motorist to drive on and he refused to do so. "The State has a legitimate interest in enforcing its traffic laws," the Court observed, "and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction." *Id.* at 109. Based upon their "cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident," the police therefore could issue a binding "order to disperse," and arrest offenders when that order was not followed. A similar appreciation of the discretion police officers need explains Fourth Amendment decisions permitting officers to exercise their discretion in determining whether to ask a motorist stopped for a traffic violation to leave the car, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), or to ask the passenger to leave the car as well, *Maryland v. Wilson*, 117 S.Ct. 882 (1997). Consistent with these views most states permit police officers to arrest citizens who refuse to obey a dispersal order or an order to stay clear of a traffic hazard. *See* Appendix D. Because the law presumes that police officers like all public employees will obey the Constitution, *see Agostini v. Felton*, 117 S.Ct. 1997, 2015-16 (1997), the law properly assumes that they will lawfully exercise discretion in these settings.

In addition to avoiding the ban on standardless laws and the risk of discriminatory enforcement that comes with them, the carefully-gauged discretion of the Chicago ordinance also fits well within the Court's general guidelines concerning the broad police powers reserved to the States and their subdivisions. In

organizing local communities and establishing local rules of conduct, the "police power is . . . ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The ordinance at issue of course tries to do just that. It strives to "make the streets safe" from criminal gang recruitment and street crime. *See* Pet. App. 68a (regulation requiring Chicago district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community" for enforcement of the ordinance).

The Court, moreover, has frequently acknowledged the power of States and subdivisions to enact similar types of prophylactic legislation. *E.g., Williamson v. Lee Optical of Okla, Inc.*, 348 U.S. 483, 486-88 (1955) (upholding law prohibiting all lens-fitting except under direct prescription) ("[T]he legislature might have concluded that [a prescription] was needed often enough to require one in every case. ... It is enough that there is an evil at hand for correction, and that it might be thought that a particular legislative measure was a rational way to correct it."); *Village of Belle Terre*, 416 U.S. at 4 (noting that "historic police power problems need not loom large or actually be existent in a given case" for a law to be valid, because "laws may also find their justification in the fact that, in some fields, the bad fades into the good by . . . insensible degrees"); *Memphis v. Greene*, 451 U.S. 100, 126-27 (1981) ("As a matter of constitutional law a city's power to adopt rules that will avoid anticipated traffic safety problems is the same as its power to correct those hazards that have been revealed by actual events").

All things considered, the Chicago ordinance advances the group goals of public order and community policing while respecting the constitutional rights of individuals to be free of

standardless and arbitrary law enforcement. In many respects, the legality of this ordinance poses a far less severe risk to liberty than the customary right of officers to detain individuals reasonably suspected of crime. Chicago, again, does not authorize a detention based upon loitering with a gang member, but only upon refusal to obey the dispersal order. Far from requiring detention, the police officer's order assumes detention will be avoided when the individual complies with the order. At most, the dispersal order intrudes upon a generalized privilege of casual association in public places -- a privilege that receives no special protection under the Constitution. *See City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989).

III. OTHER SAFEGUARDS PROVIDE AMPLE SECURITY AGAINST IMPROPER APPLICATIONS OF THIS AND OTHER LOITERING LAWS.

Among the competing principles auditioning to govern this case, the most essential may be the assurance that other constitutional doctrines preclude the Chicago ordinance from being improperly applied in the future or becoming the model for improper lawmaking efforts in other jurisdictions. In our view, numerous safeguards exist to prevent improper applications of the Chicago ordinance or of other provisions like it.

First, this is a facial challenge, which is to say an effort to strike the law in all of its applications. Such across-the-board attacks on legislation are by definition the most difficult to sustain. Because courts have a duty to save, not destroy, legislation, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990), the Court has long respected the presumption of constitutionality by holding that a facial challenge may succeed only after the claimants have met their burden of showing "no

set of circumstances" in which the law may be constitutionally applied." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Reno v. Flores*, 507 U.S 292, 301 (1993). A similar rule governs vagueness challenges. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). So long as the statute does not substantially infringe the rights of free speech or assembly, which this does not, *see Colten v. Kentucky*, 407 U.S. at 109 (free speech), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assembly), *Stanglin*, 490 U.S. at 25 (free speech and assembly), it must satisfy the rigorous requirements of a facial challenge. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) ("There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face': either because it is unconstitutional in every application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad'"); *Kolender, supra*; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Under these circumstances, a decision upholding the law would by no means give law-enforcement officers or legislators a free hand. They would still remain subject to as-applied challenges in the event the law was improperly applied in a given setting or with respect to one group or another. Nor do case-by-case rulings by any means dilute the underlying constitutional mandate. Take a situation in which a particular interpretation of a public-order statute were invalidated. What State would not get the message? State officials who continued improperly to apply the statute would soon feel the deterrent sting of section 1988 attorney fees. And after that they would be sure to see civil rights actions brought against them in their individual capacity, often with little likelihood of qualified immunity. The distinction between facial and as-applied challenges ultimately reflects the benefit of the doubt that federal courts customarily give government officials, namely that they presumably will obey, not offend, their duty to uphold the

Constitution in implementing a statute. And if a "hypothetical possibility" of unconstitutional application develops in the future, *General Motors v. Tracy*, 117 S. Ct. 811, 830 (1997), State and federal courts stand prepared to strike it.

Second, while there has been no plausible showing that any free speech protections have been infringed on this record, the First Amendment also would restrain improper applications of the law in the future. Gang members of course remain free to speak and assemble regarding all manner of subjects. Neither Chicago nor any other government body thus may manipulate a public-order statute to the improper end of curbing free speech or other First Amendment rights.

Third, equal protection precludes such ordinances from being used as an invidious cover for race discrimination. Many of the Court's vagueness decisions involve applications of laws that "are irresistibly suggestive of racial bias." Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 197 (1985). *Papachristou*, for example, involved a vagrancy prosecution of two white women and two black men riding together down a city street. 405 U.S. at 158. *Coates* arose from an "alleged[ly] discriminatory enforcement" of a loitering statute that "figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967." 402 U.S. at 616 n.6. *Cox v. Louisiana*, 379 U.S. 536 (1965), arose in the context of a demonstration by students picketing stores with segregated lunch counters. 379 U.S. at 538-39, 551. *Kolender* involved the prosecution of an African American disk jockey and rock-music promoter who was arrested 15 times in less than two years during late-night walks through a San Diego suburb. 461 U.S. at 354 Livingston; *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 612, n.292 (1997). And *Shuttlesworth*, some members of the Court concluded, simply involved the prosecution of civil

rights leaders "in the tense racial conflict in Birmingham." 382 U.S. at 102 (Fortas, J., concurring, joined by Warren, C.J.). *But see id.* at 90 n.3. To the extent equal-protection concerns explain these vagueness decisions, equal-protection law offers a basis for striking these applications of conventional public-order statutes. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 292 (1963), (overturning a disorderly conduct conviction "obviously based, according to the testimony of the arresting officers themselves, upon their intention to enforce racial segregation in the park"); *United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996).

Fourth, the Eighth Amendment bars status-based prosecutions that attempt to punish individuals for who they are, not for what they have done. It thus violates the provision to imprison a narcotics addict "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." *Robinson v. California*, 370 U.S. 660, 666-67 (1962). *See Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) ("criminal penalties may be inflicted only if the accused has committed some act . . . which society has an interest in preventing"); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (valid convictions are those "resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed"). Under these cases, while Chicago may assuredly prosecute actively loitering criminal gang members who refuse to leave when asked to do so, *see Scales v. United States*, 367 U.S. 203, 225-27 (1961), it may not prosecute them simply for being passive members of a gang, *cf. Dawson v. Delaware*, 503 U.S. 159, 166 (1992) (mere membership in Aryan Brotherhood not relevant "because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts"). Here, of course, the dispersal order itself rests on the criminal nature of the gang's activities, Pet. App. 61a-62a.

Fifth, federal and State courts may invalidate -- and frequently have invalidated -- public-order prosecutions for lack of evidence, again in an as-applied setting. The Court has frequently found an absence of evidence to support individual applications of such statutes. *See, e.g., Barr v. City of Columbia*, 378 U.S. 146 (1964); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Johnson v. Florida*, 391 U.S. 596 (1968) (per curiam); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *Palmer v. City of Euclid*, 402 U.S. 544, 544-45 (1971) (per curiam). When justified, the courts should continue to do so in the future.

* * *

Cast in its most sympathetic light, the lower-court decision reflects a zero-sum view of lawmaking in this area -- a choice between a prophylactic interpretation of the due process clause and a prophylactic exercise of the police power. Under the one, judges may sweep up constitutional and unconstitutional State action; but under the other, the police may regulate nefarious and innocent conduct. As between the two, the lower court concluded, it is better to protect the one (individual liberty) over the other (public order).

But this reading of the court's predicament states a false dichotomy. Liberty and security are not mutually exclusive. As this area of the law well illustrates, liberty's gain sometimes becomes liberty's loss. No one knows this better than the law-abiding citizens of urban Chicago whose public square has been overwhelmed by criminal gang members. In overprotecting the rights of Chicago's criminal gangs to walk the streets or congregate on them, the lower court underprotected other members of the community who share the same interest in enjoying these "amenities of life as we have known them." *Papachristou*, 405 U.S. at 164. However constitutional these amenities may be, they surely are rights to be enjoyed by all.

When a city like Chicago thus determines that brazen, intimidating, even coercive, members of its community are infringing the enjoyment of these amenities by all citizens, it ought to have the police power to ensure that the allocation of these amenities is fairly distributed.

In the final analysis, the distinction between facial and as-applied challenges, together with the presumption that the police will obey the constitution or face a host of alternative sanctions if they do not, corrects the misperception that this area of the law is haunted by all-or-nothing-at-all extremes. To respect a community's collective security concerns simply does not slight the liberty of individuals. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Chicago has adopted a measured and eminently reasonable mechanism for improving the individual rights of all while improving the collective security of the community when doing so. The innovation should be upheld.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to reverse the lower-court decision.

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APPENDIX

A. States That Penalize Gang-Related Criminal Activity.

Alaska Stat. §11.41.110(4) (Michie 1996) (gang-participation as an element of crime, e.g., murder); §12.55.155(29) (identifying gang participation as an aggravating factor in sentencing); §11.61.160, 165 (outlawing gang recruitment); Ariz. Rev. Stat. Ann. §§ 13-105(77) (definitions), 13-2308(G) (class 2 felony offense of criminal gang participation) (West Supp. 1997); Ark. Code Ann. §§ 5-74-102 (legislative findings), 5-74-103 (definitions), 5-74-104 (defining first and second degree gang participation offenses), 5-74-203 (gang recruitment offenses), 5-74-105 (offense of using another's property for gang activity), 5-74-107 (unlawful discharging of firearms from vehicle) 5-74-108 (enhancement of penalties acting in concert), 5-74-201 (findings), 5-74-202 (definitions), 5-74-203 (offense of soliciting gang membership) (Michie 1997); Fla. Stat. ch. 874.02 (legislative findings), 874.03 (definitions), 874.04 (enhancement of felonies committed as part of pattern of gang activity) (1993); Ga. Code Ann. §§ 16-15-2 (legislative findings), 16-15-3 (definitions), 16-15-4 (enhancement of gang-related misconduct) (Michie 1996); Ind. Code §§ 35-45-9-1, 2 (definitions), 35-45-9-3 (gang participation offense), 35-45-9-4 (compelling membership in gang) (1993); 720 Ill. Comp. Stat. Ann. 570/405.2 (offense of street criminal drug conspiracy) (West Supp. 1997); Iowa Code Ann. §§ 723A.1 (definitions), 723A.2 (gang participation offense) (West 1993 & Supp. 1997); Kan. Stat. Ann. § 21-4704(k) (sentencing guidelines presume imprisonment for gang offense) (Supp. 1996); La. Rev. Stat. Ann. §§ 15:1402 (legislative findings), 15:1403 (gang participation offense), 15:1404 (definitions) (West 1992 & Supp. 1998); Mass. Gen. Laws Ann. ch. 265, § 44 (offense of coercing minor to join gang) (West Supp. 1997); Minn. Stat. § 609.229 subd. (1)

(definitions), subd. (2) (participation offense) (1992 & Supp. 1993); Mo. Ann. Stat. §§ 578.421 (definitions), 578.423 (participation offense), 578.425 (enhancements), 578.435 (offense of possessing weapons for gang crime) (West 1995); Mont. Code Ann. §§ 45-8-402, 405 (definitions), 45-8-403 (offense of coercing membership), 45-8-404 (enhancement of sentence for gang-related felony), 45-8-406 (offense of supplying firearms to gang) (1997); Nev. Rev. Stat. § 193.168 (doubling prison term for gang-related crime) (1997); Okla. Stat. Ann. §§ 21-856(D) (offense of willfully recruiting minor into gang) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 (definitions), 22-10-15 (enhancements) (Michie Supp. 1997); Tex. Penal Code Ann. §§71-01(d) (definition), 71-02 (participation offense) (West Supp. 1998).

B. Early Loitering And Vagrancy Laws.

Ark. Rev. Stat. Ch. 154, §1 (1837); Act of March 5, 1861, Del. Rev. Stat. 1852 [As Amended] (1874), at 787, and Del. Rev. Stat. 1852 [As Amended] (1893), at 962; Mass. Gen. Stat. Ch. 165, §28 (1986); 1 Md. Code/Public Gen. Laws art. 30, §173 (Scott & M'Cullough ed. 1860); 2 Md. Code/Local Laws art. §§4, 908, 909, 910 (Scott & M'Cullough ed. 1860); Acts of Feb. 15, 1791, 5 N.H. Laws: First Constitutional Period (Metcalf ed. 1916), at 691-92; Act of June 10, 1799, N.J. Laws Digest (Elmer ed. 1868), at 1007; Act of January 10, 1857, §I, Third, pamphlet at 19; N.M. Rev. Stat. & Laws (1865); 1 N.J. Stat/Rev. Stat. Ch. 20, tit. 2, §1 (1869); Act of June 13, 1836 (P.L. 548), Pa. Stat. Law Digest (Purdon 1910), at 5017-19; R.I. Gen. Stat. Ch. 232, §24 (1872), at 555, Tenn. Code ch. 105, §§1-3 (1875); Tex. Penal Code tit., iv, art. 891-900 (1875); Va. Stat. Ch. 23, §§I-IV (1776).

C. Modern Loitering Laws

State: Ala. Code §13A-11-9 (Michie 1994) (offense of loitering for various purposes, including the purposes of begging, gambling, soliciting sex, or drug use); Ariz. Rev. Stat. §13-2905 (West 1989 & Supp.1997) (misdemeanor offense of loitering in a manner that disturbs public peace or for purposes such as begging, soliciting sex, gambling); Ark. Code Ann. §5-71-213 (Michie 1997) (misdemeanor offense of loitering under circumstances warranting alarm or concern for safety or loitering in specified places); Cal. Penal Code §647(d) and (e) (offense of disorderly conduct for loitering near public toilet with lascivious purpose, or for loitering and wandering without identifying legitimate purpose); Del. Code Ann. tit. 11, §1321 (Michie 1995) (offense of loitering where obstructing public passage, or loitering in specified places, or loitering for purpose of begging or soliciting sex, or loitering under circumstances warranting alarm for safety); Ga. Code Ann. §16-11-36 (1996) (misdemeanor offense of loitering under circumstances justifying alarm or concern for safety); 9 Guam Code Ann. §61.30 (1996) (offense of loitering or prowling in a manner warranting alarm for safety); Ky. Rev. Stat. Ann. §525.090 (Michie 1990)(offense of loitering for drug use or in specified places); La. Rev. Stat. Ann. tit. 14, §107(7) (vagrancy offense for persons "who loiter around any public place of assembly"); Mich. Comp. Laws Ann. §750.167(j) and (k) (West 1991 & Supp. 1998) ("disorderly person" offense where one loiters "about a place where an illegal occupation or business is being conducted," or for loitering in specified places); Minn. Stat. Ann. §609.725(2) (West 1987 & Supp. 1998) (vagrancy offense of loitering); Nev. Rev. Stat. Ann. §207.270 (Michie 1997) (misdemeanor offense of loitering in public place near children); N.H. Rev. Stat. Ann. §644:6 (1996 & Supp. 1997) (offense of loitering under circumstances warranting alarm for safety); N.J. Stat. Snn. §2C. 33-2.1 (West 1996 & Supp. 1997) (offense of loitering for drug-related purposes); N.M. Stat. Ann. §30-20-10 (Michie 1997)

(offense of saloon owner permitting minors to loiter); N.Y. Penal Law §240.35 (McKinney 1989 & Supp. 1998) (offense of loitering for specified purposes such as begging, drug use, sexual solicitation, or in specified places such as school grounds); N.C. Gen. Stat. §14-275.1 (1997) (offense of loitering at public transportation facilities after request by officer to leave); N.D. Cent. Code §12.1-31-01(f) (1997) (offense of sex solicitation while loitering); Ohio Rev. Code Ann. §§2907.241, 3599.24(A)(5) (Anderson 1996) (misdemeanor offense of loitering to engage in [sexual] solicitation, and misdemeanor offense of loitering at polling place during election); Okl. Stat. Ann. tit. 21, §§1171, 1202 (West 1983 & Supp. 1998) (loitering as element of "peeping Tom" offenses); 18 Pa. Cons. Stat. Ann. § 5506 (1983 & Supp. 1997) (misdemeanor offense of loitering or prowling about others' houses); R.I. Gen. Laws §11-34-8 (1994 & Supp. 1997) (offense of loitering for purposes of sexual solicitation); S.C. Code Ann. §16-17-420(b) (Law. Co-op. 1985 & Supp. 1997) (offense of school loitering); Utah Code Ann. §76-10-1302(c) (1995 & Supp. 1997) (loitering as element of prostitution offense); V.I. Code Ann. tit. 14, §§1191, 2221(a)(15, (16), (17) (1997) (offense of loitering under specified circumstances, and vagrancy offense of loitering in specified places); Wis. Stat. Ann. §947.02(3) (West 1996 & Supp. 1997) (offense of loitering for prostitution purposes).

Federal: 4 C.F.R. 25.6 (prohibiting "[l]oitering . . . in the GAO Building or on its grounds which creates . . . a nuisance"); 7 C.F.R. 500.5 (prohibiting "unwarranted loitering" on National Arboretum Property).

D. State Dispersal Laws.

Ala. Code §13A-11-6 (Michie 1994) (misdemeanor offense of "failure to disperse" where a person "participates with five or more other persons in a course of disorderly conduct likely to cause substantial harm or serious inconvenience,

annoyance or alarm, and intentionally refuses or fails to disperse when ordered to do so by a peace officer or other public servant lawfully engaged in execution or enforcing the law"); Ariz. Rev. Stat. Ann. §13-2902(A)(2) (West 1989 & Supp. 1997) (misdemeanor offense of unlawful assembly where a person "being present at an assembly of two or more other persons who are engaged in or who have the readily apparent intent to engage in conduct constituting a riot [defined elsewhere] knowingly remain[s] there and refus[es] to obey an official order to disperse"); Ark. Code Ann. §5-71-207 (a)(6) (Michie 1997) (misdemeanor offense of disorderly conduct where a person "with the purpose to cause public inconvenience, annoynance, or alarm or recklessly creating a risk thereof ... [c]ongregates with two (2) or more other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law"); Cal. Penal Code §727 (West 1985) (offense of failing to disperse under riot conditions); Colo. Rev. Stat. Ann. §18-9-107(b) (West 1997) (misdemeanor offense of "obstructing highway or passageway" where individual "without legal privilege intentionally, knowingly or recklessly [d]isobeys a reasonable request or order to move issued by a person he knows to be a peace officer, a fireman, or a person with authority to control the use of the premises, to prevent obstruction of a highway or passageway or to maintain public safety by dispersing those gathered in a danagerous proximity to a fire, riot, or other hazard"); Del. Code Ann. tit. 11, §1321 (Michie 1995) (offense of loitering where "[t]he person fails or refuses to move on when lawfully ordered to do so by any police officer"); Ga. Code Ann. §26-2604 (1996) (misdemeanor offense of unlawful assembly where a person "knowingly participates" in an "assembly of two or more persons for the purpose of commiting an unlawful act and the failure to withdraw from the assembly on being lawfully commanded to do so by a peace officer"); 9 Guam Code Ann. §61.10(b) (1996) (misdemeanor offense of 4 or more persons participating in

course of disorderly conduct and failing to disperse upon order to do so); Haw. Rev. Stat. Ann. §711-1102 (Michie 1994) (misdemeanor offense of "failure to disperse" where a person who is participating with "six or more persons .. in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm" knowingly fails to comply with a dispersal order by a peace officer); Idaho Code §18-6410 (1997) (misdemeanor offense of "refusal to disperse" where "two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer"); 720 Ill. Comp. Stat. Ann. §5/25-1(e) (West 1993) (misdemeanor offense of "mob action" where "any participant" in an assembly of 2 or more persons uses force or violence to disturb the public peace, or to do an unlawful act, "does not withdraw on being commanded to do so by a peace officer"); Ky. Rev. Stat. Ann. §§525.060, 525.160 (Michie 1990 & Supp. 1998) (misdemeanor offense of refusing to obey dispersal order in proximity to emergency, and misdemeanor offense where participant in course of disorderly conduct refuses to disperse when ordered to do so); Me. Rev. Stat. Ann. 17A §502, (West 1983 & Supp. 1997) (offense of failure to disperse where persons in participating in, or located in vicinity of, disorderly conduct refuse to disperse); Mass. Gen. L. ch. 269, §2 (1993 & Supp. 1998) (offense of failing to depart from riot when ordered to do so); Mich. Comp. Laws Ann. §750.523 (West 1991 & Supp. 1998) (offense of failing to depart from riot or unlawful assembly on order); Minn. Stat. Ann. §609.715 (West 1987 & Supp. 1998); Miss. Code Ann. §97-35-7(1) (1994 & Supp. 1997) (misdemeanor offense of disobeying various types of police orders); Mo. Ann. Stat. §574.060 (Vernon 1995 & Supp. 1998) (misdemeanor offense of refusing to disperse from riot); Mont. Code Ann. §45-8-102 (1996) (offense of failure of disorderly persons to disperse on order); Nev. Rev. Stat. Ann. §203.020 (Michie 1997) (misdemeanor offense of persons assembling to disturb public peace or do unlawful act and failing

to disperse when ordered to do so); N.H. Rev. Stat. Ann. §§644:1, 644:2(II)9e) (1996 & Supp. 1997) (offense of faling to disperse from riot and offense of disorderly conduct for "knowing refus[al] to comply with a lawful order of a peace officer to move from any public place"); N.J. stat. Ann. §2C: 33-1(b) (West 1995 & Supp. 1998) (offense of persons participating in course of disorderly conduct failing to disperse when ordered to do so); N.Y. Penal Law §240.20(6) (McKinney 1989 & Supp. 1998) (offense of disorderly conduct where one who congregates with others in a public place refuses to comply with order to disperse); N.C. Gen. Stat. §14-288.5(a) (1997) (misdemeanor offense of failing to disperse upon order by a law enforcement officer who has a reasonable belief that a riot or disorderly assemblage of 3 or more persons is occurring); N.D. Cent. Code §12.1-25-04 (1997) (misdemeanor offense of failing to disperse when ordered under riotous circumstances); Ohio Rev. Code Ann. §2917.13(A)(2) (Anderson 1996) (misdemeanor offense for "knowing[] [f]ail[ure] to obey the lawful order of any law enforcement officer engaged in his duties at the scene of or in connection with a fire, accident, disaster, riot or emergency of any kind"); Okl. Stat. Ann. tit. 21, §1316 (West 1983 & Supp. 1998) (misdemeanor offense for failure to disperse on order from scene of riot, rout or unlawful assembly); Or. Rev. Stat. §166.025(1)(e) (1990) (misdemeanor offense of disorderly conduct where one "congregates with persons in a public place and refuses to comply with a lawful police order to disperse"); 18 Pa. Cons. Stat. Ann. §5502 (1983 & Supp. 1998) (misdemeanor offense of 3 or more persons participating in course of disorderly conduct causing or expected to cause harm or serious inconvenience refusing to disperse upon officer's order to do so); R.I. Gen. Laws §11-38-2 (1994 & Supp. 1997) (offense of refusing to disperse during declared emergency); S.C. Code Ann. §16-7-10(a) (Law. Co-op. 1985 & Supp. 1997) (offense of refusing to disperse during declared emergency); S.D. Codified Laws Ann. §22-10-11 (1988 & Supp. 1997) (misdemeanor offense of refusing

dispersal order during riot or unlawful assembly); Tenn. Code Ann. §39-17-305(2) (1997) (misdemeanor offense for refusing to obey official order to disperse "issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency"); Tex. Penal Code Ann. §42.03(a)(2) (West 1994 & Supp. 1998) (misdemeanor offense of failing to move when ordered to do so to prevent obstruction or "to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard"); Utah Code Ann. §76-9-104 (1995 & Supp. 1997) (misdemeanor offense of failing to disperse on order at scene of riot, disorderly conduct or unlawful assembly); V.I. Code Ann. tit. 5, §4022 (1997) (offense of failing to disperse upon order to do so); Vt. Stat. Ann. tit. 13, §901 (1974 & Supp. 1998) (offense of failing to disperse upon order from riotous or tumultuous assembly); Va. Code Ann. §18.2-407 (Michie 1996 & Supp. 1997) (misdemeanor offense of failing to disperse on order from place of riot or unlawful assembly); Wash. Rev. Code Ann. §9A.84.020 (West 1988 & Supp. 1998) (misdemeanor offense of failing to disperse on order from congregation of 3 or more persons, where actions of the group create a substantial risk of injury to persons or substantial harm to property); W.Va. Code §61-6-1 (1997) (offense of failing to depart from scene of riot or unlawful assemblage); Wis. Stat. Ann. §947.06(3) (West 1996 & Supp. 1997) (misdemeanor offense for failure to disperse on order where congregation of 3 or more persons creates such disturbance "that it is reasonable to believe that the assembly will cause injury to persons or damage to property").